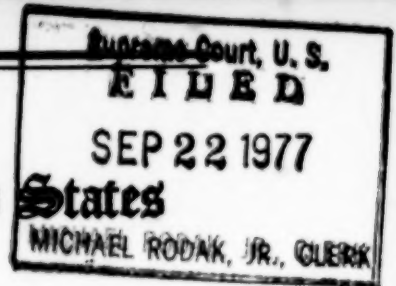


IN THE
Supreme Court of the United States
OCTOBER TERM, 1977.



No. 77-310

DONALD R. SMITH, TREASURER OF ILLINOIS, MICHAEL J. BAKALIS, COMPTROLLER OF ILLINOIS, ROBERT M. WHITLER, DEPARTMENT OF REVENUE OF ILLINOIS, JOHN W. CASTLE, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS,
Petitioners,

vs.

ROBERT H. SNOW, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED, MARVIN E. SCHATZMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS OF COOK COUNTY, ILLINOIS, EDWARD J. ROSEWELL, AS TREASURER AND EX-OFFICIO COLLECTOR OF COOK COUNTY, ILLINOIS, STANLEY T. KUSPER, JR., CLERK OF COOK COUNTY, ILLINOIS, THE COUNTY OF COOK, A BODY POLITIC AND CORPORATE, ILLINOIS CENTRAL GULF RAILROAD CO., A DELAWARE CORPORATION,
Respondents.

RESPONSE OF ROBERT H. SNOW AND MARVIN E. SCHATZMAN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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ROBERT H. SNOW, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED, MARVIN E. SCHATZMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS OF COOK COUNTY, ILLINOIS, EDWARD J. ROSEWELL, AS TREASURER AND EX-OFFICIO COLLECTOR OF COOK COUNTY, ILLINOIS, STANLEY T. KUSPER, JR., CLERK OF COOK COUNTY, ILLINOIS, THE COUNTY OF COOK, A BODY POLITIC AND CORPORATE, ILLINOIS CENTRAL GULF RAILROAD CO., A DELAWARE CORPORATION,

Respondents.

RESPONSE OF ROBERT H. SNOW AND MARVIN E. SCHATZMAN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Respondents Robert H. Snow ("Snow") and Marvin E. Schatzman ("Schatzman") pray that the petitioners' petition for a writ of certiorari ("State petition") to review the judg-

ment and opinion of the Supreme Court of Illinois, entered April 5, 1977, be denied.

Prefatory Note.

Certain abbreviations are sometimes used herein as follows: Illinois Central Railroad Company ("IC"), Illinois Central Gulf Railroad Company ("Gulf"), Interstate Commerce Commission ("ICC"), the County of Cook and certain of its officials who are respondents herein ("Cook County"), the State of Illinois (the "State"), the State's petition for a writ of certiorari (the "State petition"), and the Gulf, Mobile & Ohio Railroad Company ("GM&O").

QUESTIONS PRESENTED.

Does the ICC (who took no such action) have any power to decide the purely State law questions of whether State tax immunities can be transferred to successor railroad corporations without the consent of the legislature?

Where the highest court of the State has fully and finally determined the purely State law questions of the transferability of State tax immunities to a successor railroad corporation, is that decision entitled to comity and finality?

Where the real remaining issue is whether the State should be permitted to retain all tax monies collected on a particular piece of property or whether the State must share with local taxing bodies such tax monies and where the highest court in the State has decided that state law issue, is that decision entitled to comity and finality?

Could IC's tax immunities, which were personal to it, be transferred to Gulf without the consent of the Illinois General Assembly?

Could IC's privilege of paying on the charter property the 7% tax in lieu of all other state taxes be transferred to Gulf without the consent of the Illinois General Assembly?

Where the State filed no pleading which raised nor otherwise presented to or preserved in the state courts certain issues, may the State raise such issues for the first time before this Court?

Where the State has filed no pleading requesting any of the relief which the State petition implies the State should have, does there exist any actual controversy to be resolved by this Court?

Where the State alleges error by the ICC but where the State (although it received the required notice) failed to appear before or to raise with the ICC the matters as to which the State now urges the ICC committed error, can the State collaterally attack the ICC's decision and has the State failed to exhaust its alleged administrative remedy?

Is the Interstate Commerce Act, particularly Section 5(12) thereof, 49 USC 5(12), constitutional?

If 49 USC 5(12) is constitutional, is one of its effects to give to any carrier in an ICC approved transaction, directly and without further action or finding by the ICC, full power to own any properties without State approval?

If 49 USC 5(12) is constitutional, is another of its effects to directly relieve any carriers in an ICC approved transaction (without further action or finding by the ICC) of all restraints, limitations, and prohibitions of State law insofar as necessary to carry out an ICC approved sale of assets?

STATEMENT OF THE CASE.

In 1851 the Illinois Central Railroad ("IC"), an Illinois corporation, received from the State of Illinois ("State") its charter (the "charter") to operate a railroad. Under the charter IC received certain land grant property (the "charter property"). Portions of the charter property constituted about 40% of IC's Illinois trackage and contained other operating structures as well. Other portions of the charter property (in excess of 2,000,000 acres) were sold by IC over a period of 124 years to third parties without the consent of the State.

Under the charter IC received as to the charter property immunity from all state and local taxation in exchange for which IC paid to the State in lieu of all such taxes a 7% tax (the "7% tax") upon charter property gross receipts. No portion of the 7% tax was distributed to local governments. All of the 7% tax was retained by the State.

Effective August 10, 1972, pursuant to a plan of reorganization (the "plan") approved by the Interstate Commerce Commission ("ICC"), IC and the Gulf, Mobile & Ohio Railroad ("GM&O") merged to become Illinois Central Gulf Railroad Company ("Gulf"), a new Delaware corporation. Regarding IC only, under the plan IC sold and conveyed all of its assets (including the charter property) to Gulf, IC was to be dissolved, and the new Delaware corporation, Gulf, was to be and was the surviving corporation. The plan contained no provisions for and did not mention IC's tax immunities, the transfer of IC's tax immunities to Gulf, or the assumption by Gulf of IC's privilege of paying the 7% tax in lieu of all other taxes on the charter property. The ICC never considered those matters either.

After the merger the successor railroad, Gulf (not IC), began to pay, and the State collected from Gulf, the 7% tax in lieu of all other state and local taxes on the charter property. The Illinois General Assembly never approved the merger and never consented to the transfer of IC's tax immunities to Gulf or to permitting Gulf to pay the 7% tax in lieu of all other taxes on the charter property.

Plaintiff Robert H. Snow ("Snow") filed this state court taxpayer's suit alleging that the actions of certain State officials in continuing to accept from Gulf (not IC) after the merger, the 7% tax in lieu of all other state and local taxes on the charter property was unlawful because (1) IC's tax immunities were personal to it, and could not be, and under the plan, in fact, were not conveyed to Gulf, and (2) the plain language of the charter stated that IC lost its charter property tax immunities if the charter property was "sold or conveyed". The complaint

prayed that the charter property be assessed, which would then require Gulf to pay all normal railroad taxes on the charter property.

A Cook County taxpayer, Marvin E. Schatzman ("Schatzman") intervened and adopted Snow's pleadings. Cook County also entered the case and adopted Snow's position. The trial court held that IC's tax immunities did not pass to Gulf under the plaintiffs' second theory, ordered the charter property assessed, and enjoined the State officials from collecting the 7% tax in lieu of all other taxes on the charter property. The Illinois Supreme Court decided that the language of the charter was uncertain but, with minor modifications, affirmed the trial court's judgment under the plaintiffs' first theory.

SUMMARY OF ARGUMENT.

First, no pleading filed by the State raised or preserved any federal or Tenth Amendment question. No brief filed by the State preserved or raised a Tenth Amendment question. The State's brief before the Illinois Supreme Court, however, did present one issue which may be pertinent here which was:

"Whether the trial court erred in finding that the special Illinois Charter of the Illinois Central Railroad Co. and State laws prohibiting its corporate dissolution and transfer of charter assets have been effectively repealed by Interstate Commerce Commission order".

Thus, of the four "Questions Presented" at State petition, pp. 2 and 3, possibly only the first was preserved before the Illinois Supreme Court.

Second, the State absolutely misreads what is now Section 5(12) and what at the time of the merger was Section 5(11) of the Interstate Commerce Act, 49 USC 5(12) [formerly 49 USC 5(11) at the time of the merger]. That section contains two applicable clauses. The first is that:

"Any carrier or corporation participating in or resulting from any transaction approved by the Commission there-

under, shall have *full power* * * * to carry such transaction into effect and *to own* and operate *any properties* and exercise any control or franchise acquired through said transaction *without* invoking any *approval under State authority* (emphasis added);"

The ICC approved the plan. The plan provided for the transfer of all of IC's assets (including the charter property) to Gulf. Thereafter, pursuant to that approval, IC by sale indenture "sold and conveyed" the charter property to Gulf. The only action taken by the ICC was to approve the plan.

Contrary to the State's "Questions Presented", the ICC did not repeal the 7% tax nor any other state statutes. The ICC took no action other than to approve the plan. Under the first clause of 49 USC 5(12) in an ICC approved transaction, the carrier is given full power to own any properties without approval under State authority. Although under the charter IC needed no State approval to sell the charter property to Gulf, even if it did, once the ICC approved the plan, the need for any State approval was suspended by direct action of 49 USC 5(12) without the necessity of any further action or finding by the ICC.

Therefore, by direct action of 49 USC 5(12), Gulf received full power to own the charter property without State approval because such sale was part of the ICC approved merger. No further action was taken nor was any finding made by the ICC because none was required, and because the State, although it received notice, never appeared before the ICC to present the questions which the State now raises. All of the State's "Questions Presented" ignore the clear language and effect of 49 USC 5(12). Every brief filed by the State has refused to acknowledge or deal with this simple fact.

Third, in addition, the second clause of 49 USC 5(12) provides:

"and *any carriers or other corporations* * * * participating in a transaction approved or authorized under the provi-

sions of this section shall be and they *are relieved* * * * of all other *restraints, limitations, and prohibitions of law*, Federal, *State*, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and *to hold, maintain, and operate any properties* and exercise any control or franchises acquired through such transaction (emphasis added)."

Again, once the ICC approved the plan, which included sale of the charter property to Gulf, by direct action of the statute without any further action or finding by the ICC being required, IC and Gulf were relieved of all restraints, limitations and prohibitions of State law insofar as such relief was necessary to enable IC and Gulf to carry into effect the plan. The charter property was essential to the merger since it constituted 40% of IC's Illinois trackage as well as having situate thereon other railroad operating structures and properties. Therefore, all of the State's "Questions Presented" also are obviated by the second clause of 49 USC 5(12) as well.

Fourth, under the Illinois Supreme Court decision (the "state court decision") the charter property is no longer tax exempt and Gulf must now pay on the charter property the same taxes which Gulf pays on its non-charter property and which all other railroads pay on their Illinois property, no more and no less. There is, therefore, no discrimination and no undue burden on interstate commerce. In fact, a discrimination in favor of IC and against other railroads has been ended with the termination of IC's special state tax immunities.

Fifth, the taxpayer, Gulf, makes no complaint of the state court decision. This is so because having analyzed its new tax burden, Gulf has concluded that it will be more or less the same whether it pays the 7% tax or pays all other regular state and local taxes to which the charter property is subject now that IC's tax immunities are gone. Gulf so stated in its oral argu-

ment to the Illinois Supreme Court and also stated that it was not contesting which tax it paid.

Sixth, a principal effect of the state court decision is that now some of the tax money which previously went entirely to the State will go to local governmental units. This is the State's true objection to the state court decision. Even though Gulf may pay greater taxes on the charter property, depending upon final assessments, now that IC's tax immunities are gone, the State prosecutes this petition solely because the State still wants all, not just some, of the charter property tax money and wants local governmental units to receive nothing.

Seventh, whether IC's state tax immunities passed to a successor railroad corporation and whether local governmental units should share in tax revenue are purely local state issues which now have been resolved by the highest court of the State. That decision is entitled to comity. There are not present here federal constitutional issues or federal questions of any significance, despite the efforts of the State to create them. This is particularly true since the State never pleaded such issues in the state courts. The most obvious jurisdictional ground which the State might have claimed before this Court, i.e. the Contract Clause of the United States Constitution, never was raised by the State either in the trial court or before the Illinois Supreme Court.

Eighth, in another era when the Contract Clause of the U. S. Constitution was a more important jurisdictional ground before this Court, this Court passed many times on the precise question of whether state tax immunities granted to a railroad under a charter could be conveyed to a successor railroad corporation without the consent of the applicable legislature. This Court fully and finally determined that such tax immunities could not be so conveyed.

Among those cases are *Yazoo & Mississippi R. R. v. Vicksburg*, 209 U. S. 358 (1908); *Rochester Railway Co. v. Rochester*, 205 U. S. 236 (1907); *Yazoo and Mississippi v. Ry. Co. v. Adams*, 180 U. S. 1 (1900); *Chesapeake & Ohio*

Railway Co. v. Miller, 114 U. S. 176 (1885); *St. Louis, Iron Mountain & Southern Railway Company v. Berry*, 113 U. S. 465 (1885); *Memphis Railroad Co. v. Commissioners*, 112 U. S. 609 (1884); *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244 (1883); *Wilson v. Gaines*, 103 U. S. 417 (1880); *Railroad Co. v. Georgia*, 98 U. S. (8 Otto) 359 (1878); and *Morgan v. Louisiana*, 93 U. S. 217 (1876). These ten cases were referred to in the state court decision and are hereinafter sometimes referred to as the "Charter Immunity Cases."

The Charter Immunity Cases expressly hold that tax immunities granted to a railroad under a charter without more cannot be conveyed to a successor railroad corporation without the consent of the legislature. This has been the settled law for over 70 years and the State presents no reasons for change, particularly where the taxpayer makes no complaint.

Ninth, the State continuously has asserted that the issues are (1) whether IC can be legally dissolved without the State's consent, and (2) whether the charter property can be conveyed to Gulf under the plan without the consent of the State. The first is not an issue. It makes no difference if IC is legally dissolved or not. However, because the State keeps raising the issue, it keeps receiving adverse rulings on this extremely ancillary point.

The issue which the state court decision decides is one which is purely local state law, i.e. whether IC's tax immunities could be or were conveyed to Gulf under the plan without the consent of the Illinois General Assembly. The state court decision by the highest court in the State decides a "cause of action" which "is one traditionally relegated to state law." *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977), 45 U. S. L. W., at 4192, quoting *Cort v. Ash*, 422 U. S. 66 at 78; *Santa Fe Industries, Inc. v. Green*, 97 S. Ct. 1292, 45 U. S. L. W. 4317, 4321 (1977). That decision is entitled to both finality and comity. The state court decision concludes that the Illinois General Assembly did not so consent because it never took any

action at all on the question; that IC's tax immunities therefore could not be and, in fact, were not conveyed to Gulf under the plan; and that the ICC did not purport to decide, did not discuss, and apparently was not even aware that IC had any tax immunities.

IC's dissolution was irrelevant to those issues once IC conveyed all its assets, including the charter property, to Gulf, and also ceased doing business and stopped electing officers and directors. At that point IC was a meaningless shell and in keeping with this Court's decision in *Rochester Railroad Co. v. Rochester*, 205 U. S. 236, 256 (1906) that:

"* * * A corporation without shareholders, without officers to manage its business, without property with which to do business, without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence." (Citations.)

both the Illinois Supreme Court and the trial court on this ancillary question held that IC was dissolved.

Tenth, on the second issue, *i.e.* whether IC's charter property could be conveyed to Gulf under the plan without the consent of the State, the State has argued that it cannot be because the charter is a "solemn and binding contract" between IC and the State which cannot be unilaterally abrogated and that, in particular, there cannot be a sale of the entire railroad by IC without the consent of the State, citing as authority a line of cases of which *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 83 (1879) is typical and which predate passage of the Interstate Commerce Act.

The response which both the state courts and all parties in this litigation (other than the State) have made to this argument is that Section 5(12) of the Interstate Commerce Act is reality, that in *Illinois Central Gulf R. R.—Acquisition*, 338 ICC 805, 879-880 (1971) the ICC approved the plan and approved the transfer of all of IC's property (including the charter property) to Gulf and the dissolution of IC, that the ICC has paramount

and plenary power over the transportation aspects of the merger, and that under 49 USC 5(12) any State law which might have prohibited Gulf's ownership of the charter property was suspended, partly because the charter property constituted a part of the railroad right-of-way south through Illinois, was land over which the tracks ran and upon which stations and other necessary buildings were located, and therefore was essential to the merger. The State's sole response has been its erroneous belief that 49 USC 5(12) does not so provide, although this Court has so held in *Schwabacher v. United States*, 334 U. S. 182 (1948) and *Seaboard Air Line R. R. v. Daniel*, 333 U. S. 118 (1948).

In addition, as Snow has suggested and as both the trial court and the state court decision found, this argument of the State is pure abstraction. If the State were correct that the charter property could not be transferred to Gulf without the consent of the State, a necessary consequence would be that the five-year old merger would have to be rescinded; that IC and GM&O would become separate railroads again; that each would elect officers and directors after deciding which former Gulf shareholders would now become IC shareholders and which GM&O shareholders; that the IC and GM&O would recommence business separately, with immense ramifications as to their lessened financial strength and to their shareholders and the investing public, and with substantial problems and undoubted litigation under the federal securities laws and other laws; that in some cases new and in other cases amended tax returns for federal and state income tax and other state and local taxes would have to be filed with possibly drastic consequences; that Gulf's former lines of credit and debt financing would have to be entirely rearranged and separate financing would have to be arranged (if possible) for the two recreated but much weaker and smaller railroads (some of whose routes and services were terminated after the merger); and that all of the economics and advantages, which the ICC found (after years of hearings and much litigation) the merger would produce, would all be

lost, because, under the State's theory, IC's former charter was a "solemn and binding contract" between IC and the State.

All this is impossible, which the State well knows. The State's position before the various state courts and this Court constitutes the strongest possible argument why there must be power under 49 USC Sec. 5(12) to suspend state law to implement a railroad merger, consolidation, or reorganization. If the law were otherwise, every union of two railroads would be hounded out of existence by locally motivated litigation filed by a variety of state and local legal officers, either acting on their own initiative or at the instructions of various officials, having a multitude of purely state oriented motives.

If such had been the law, this country still would have a number of weak or bankrupt railroads each having 100 miles of less of track. Such a rule would completely frustrate any rational national transportation policy. The Illinois Supreme Court well recognized these problems, the fact that there was a national transportation policy and the need for it, and this recognition was a basis for the state court decision which the State petition now attacks.

In addition, as Snow has consistently argued and as the Illinois Supreme Court specifically found (State petition, p. A16), the State, although on *notice*, never appeared before either the ICC examiner or the ICC to assert the arguments which it asserts before this Court. If the State had, doubtless the ICC would have specifically dealt with them. Further, as the state court decision specifically finds, the State, although given a specific thirty-day continuance by the trial court to do so, never has filed a pleading in these proceedings attacking the merger, praying for rescission or a reversion of the charter property to the State or reconveyance of the charter property to IC or that IC recommence business, or requesting any of the relief which it now implies to this Court it should have. All that the State has done is to file various memoranda and briefs asserting purely theoretical arguments and advising that some day in a forum of

its own choosing the State may, but might not, file pleadings praying for such relief. There is, therefore, no actual controversy before this Court.

The state courts have extended the State every courtesy and have patiently heard and considered what obviously are only theoretical arguments at best. The State never has prayed for any relief. When a party, although specifically requested by the trial court to do so and when given a specific continuance in which to do so, consistently refuses to file pleadings requesting the relief which its memoranda and briefs imply it should have, that party has had more than its day in court, it is little wonder that the state courts showed impatience, and this four year old litigation should end.

ARGUMENT.

Specific Responses to State Petition.

Opinion Below.

(State petition, p. 2)

The abbreviated excerpts cited by the State from the ICC opinion, 338 I. C. C. 805, 879-880, 940-1 (1971) do not fairly reflect either the ICC's actions or its considerations and reference should be had to the entire opinion for a complete understanding of what the ICC considered, found, and held.

Jurisdiction.

(State petition, p. 2)

The State petition, both under "Jurisdiction", State petition, p. 2, and "Questions Presented", State petition, pp. 2 and 3, implies that the ICC considered or otherwise ruled upon the 7% tax and whether IC's tax immunities passed to Gulf. The ICC never did and the state court decision does not so hold. Nowhere does the ICC opinion or its examiner's opinion consider state taxation or state tax immunities. These issues never were

presented to the ICC and doubtless the ICC never was even aware that IC had tax immunities.

Statement of the Case.

(State petition, p. 5)

The Illinois railroad Corporation Act and the Illinois Business Corporation Act cited at State petition, pp. 5 and 6, were passed 34 years and 58 years, respectively, after IC's charter was granted. Regarding their inapplicability, the Illinois Supreme Court held (State petition, p. A11):

"* * * we decline the State's invitation to construe the acts of the legislature, 34 years or more after the charter's acceptance by IC and enactment by the General Assembly, to imply such a term in the contract between IC and State."

The statement at State petition, p. 6, that:

"The State of Illinois was not a party to the proceedings before the Commission. The Commission did not decide any question concerning the power of the Illinois Central to unilaterally dissolve its Illinois corporate existence and transfer away its charter properties, so as to relieve it from its obligation to pay the Charter Property Receipts Tax and other duties and obligations existing under Illinois law."

is best answered by the finding in the state court decision (State petition, p. A16) that:

"(We point out in this regard that the State, though given notice and invitation to attend the Commission hearings on the subject plan of reorganization, declined to attend.)"

Had the State appeared before the ICC and raised the issues which it seeks to raise before this Court for the first time, they would have been ruled upon. However, the State chose not only not to exhaust its administrative remedy (if it truly contends that the ICC has power over state taxation and state tax immunities) but it failed to avail itself of this alleged administrative remedy at all.

The statement (State petition, p. 6) that this case originated in November, 1973 is incorrect. Snow's original complaint was filed in May, 1973. State petition, pp. 6 and 7, somewhat misstates the complaint filed. In essence, the complaint sought a declaration that IC's tax immunities had not been transferred to Gulf, to compel certain State officials, whose duty it was, to assess the charter property which never before had been assessed because until the merger it had been immune from State taxes under the charter, and to enjoin the expenditure of State funds to collect the 7% tax from Gulf in lieu of all other taxes on the charter property because it was only IC (not Gulf) which had the tax immunity and the privilege of paying the 7% tax in lieu of all other taxes on the charter property.

At State petition, pp. 8 and 9, under the subheading "How the Federal Question Is Preserved", the State points out that Gulf's answer (not the State's answer and not Snow's complaint) raised certain federal questions. Neither Snow's complaint nor the State's answer thereto raised any Tenth Amendment or other federal question. Gulf (who seeks no appeal to this Court) raised certain federal questions in its brief, the State raised one possible federal question in its brief, Snow responded to them by brief, and the state courts decided those questions adversely to Gulf and the State.

The State never filed an answer or counterclaim raising federal questions, asking for the charter property to be forfeited to the State or returned to IC, praying that IC be ordered to once again commence doing business or that the merger be undone, or praying for any of the relief which its various briefs and memoranda imply it should have. Other than praying that Snow's complaint be dismissed, the State never has prayed for any relief.

Reasons for Granting the Writ.

(State petition, p. 10.)

State petition, pp. 10 and 11, argues:

"The issue of whether the Illinois Central Railroad Company has the right to unilaterally dissolve its special charter existence, transfer away its charter property and thus relieve itself of its duty to pay the Charter Property Gross Receipts Tax in contravention of Illinois law was not decided by the Interstate Commerce Commission, nor has the issue ever been adjudicated in a court of competent jurisdiction."

Breaking the foregoing down, some of it is true and some of it is not. First, nothing in the charter itself states that the State must consent to a sale of the charter property. To the contrary, the charter expressly contemplates sales of charter property to third parties without the State's consent and IC made such sales for 124 years with the knowledge of the State.

Second, the issue of IC's dissolution was before the ICC because IC's dissolution was part of the plan. No one before the ICC (least of all the State) challenged whether it could be done without the consent of the State. The State, while having received the required notice, never bothered to appear before the ICC and raise the issues which it now argues the ICC should have considered. IC's dissolution has been passed upon by two courts of competent jurisdiction, the trial court and the Illinois Supreme Court, who decided that since IC was a meaningless shell without income, assets, officers, or directors, it should be dissolved, citing *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 256 (1906).

Third, the same is true of the transfer of the charter property from IC to Gulf. It was part of the plan approved by the ICC. Without transfer of the charter property, there could have been no merger since the charter property constituted 40% of IC's total Illinois trackage. As a practical matter without the

charter property, Gulf probably would not have a right-of-way into Chicago. The State, although on notice, never appeared before the ICC to challenge whether the charter property could be transferred to Gulf without the consent of the State.

The State cannot now be heard to collaterally attack the ICC's approval of that portion of the plan under which the charter property was conveyed to Gulf. That conveyance and the merger are a reality. They cannot be undone five years later in a state court proceeding in which no party (particularly the State) has ever filed a pleading praying that they be rescinded.

Fourth, the ICC did not consider or decide whether IC's tax immunities were conveyed to Gulf or whether Gulf had the right to pay the 7% tax in lieu of all other state and local taxes on the charter property. This was so because those questions were not part of the plan, and no one presented those issues to the ICC because state taxation and state tax immunities are among those matters left under the Interstate Commerce Act to be decided by courts of competent jurisdiction. The ICC has no power over state taxation and state tax immunities and the ICC did not purport to consider those issues because the power to tax is expressly reserved to the States under the Tenth Amendment to the U. S. Constitution (so long as there is neither discrimination nor an undue burden on interstate commerce) and "the power to tax all property, businesses, and persons, within their respective limits, is original in the States and has never been surrendered". *Thomson v. Pacific Railroad*, 76 U. S. 579, 591 (1869).

The trial court and the Illinois Supreme Court were courts of competent jurisdiction to decide the purely state law questions of whether IC's tax immunities passed to Gulf and whether Gulf could continue to pay the 7% tax in lieu of all other state and local taxes on the charter property or whether the charter property now had to be assessed and regular railroad taxes paid on it. Those questions were squarely raised by Snow's

complaint and both the trial court and the Illinois Supreme Court held against the State on all issues.

State petition, pp. 11-14, argues that since the ICC did not expressly hold that it was superseding state law to permit the charter property to be conveyed to Gulf without the State's consent, the ICC cannot be presumed to have done so. As previously pointed out herein, there is no language in the charter which requires that the State must consent to a conveyance of the charter property; the charter expressly contemplates sales of charter property to third parties without the State's consent; IC sold over 2,000,000 acres of charter property over a period of 124 years without the State's consent; the State failed to exhaust its administrative remedies by presenting this question to the ICC after having received notice of the merger, plan, and ICC proceedings; once the ICC approved the merger, 49 USC §5(12) directly superseded any State law which barred conveyance of the charter property without any further action by the ICC being required, partly because there could have been no merger without the charter property since it constituted 40% of IC's Illinois trackage and had located upon it main line track, siding, stations, and other structures necessary to run the railroad.

State laws are not being lightly set aside (State petition, p. 13). State law had to be so set aside for there to be a merger at all. The ICC never made an express finding regarding State law because it was not required to do so under either of the two clauses of 49 USC § 5(12) and because of the State's gross negligence in not appearing before the ICC (after receiving the required notice) and raising what the State apparently asserts is a defense to the plan and merger. The five year old merger of IC and GM&O is a reality which cannot be overturned by the State's collateral attack when the State never has filed either before the ICC or the state courts a pleading requesting the relief to which its briefs claim the State is entitled.

State petition, pp. 12-14, cites *Florida v. United States*, 282 U. S. 194, 211-212 (1930); *North Carolina v. United States*, 325 U. S. 507, 520 (1944); *Arkansas Railroad Com. v. Chicago R. I. & P. R. Co.*, 274 U. S. 597 (1926); and *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493, 510 (1918) for the proposition that state laws are not automatically overridden by decisions of the ICC. Sometimes this is true, but it is a truth which has no application to the present case. None of the above cases are applicable here. None involved either 49 USC 5(2) or 5(12).

All of the above cited cases dealt with intrastate rates which are not involved here. All but one of them predated the National Transportation Act. None involved mergers, reorganizations, or applications of either 49 USC 5(2) or 5(12). In particular, in the instant case it is the automatic and direct action of 49 USC 5(12) which has served to set aside state law to permit the carrier, Gulf, to own the charter property without invoking State authority.

State petition, p. 12, attempts to distinguish *Seaboard Air Line R. Co. v. Daniel*, 333 U. S. 118, 124 (1948) on the basis that:

"* * * this Court held that the appellant railroad company was relieved of the necessity of complying with certain South Carolina constitutional and statutory provisions because the Interstate Commerce Commission had expressly stated in its order that this was its intention."

This misstates this Court's opinion. In *Seaboard* at 68 S. Ct. 429-30 South Carolina had argued that the ICC did not intend to set aside state law. This Court merely examined that portion of the ICC order which made a finding that compliance with the particular South Carolina law in question would not be in the public interest, and found that this sufficiently expressed the ICC's intent to set aside South Carolina law. The Court did not hold that such a finding had to be made. It merely found in *Seaboard* that the ICC had made such a finding, which the court

then referred to in its opinion. The State never does distinguish *Schwabacher v. United States*, 334 U. S. 182, 68 S. Ct. 958 (1948) relied upon in the state court decision.

State petition, pp. 14-17, argues that ICC approval generally is permissive only, leaving to the courts matters of law. In certain instances this is true with the exception of 49 USC 5(12) which has the direct effect of superseding state law to permit carriers to own property in ICC approved transactions without State approval and which also supersedes state law insofar as that may be necessary to implement an ICC approved transaction. None of the cases cited at State petition, pp. 14-17, namely, *Central Freight Lines, Inc.—Control—Alamo Exp.*, 90 MCC 96, 100-101 (1962); *McGary Transportation Co., Inc.—Purchase—DeMelle*, 50 MCC 608, 611 (1948); *Texas & N. O. R. Co. v. Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 159-60 (5th Cir. 1962), cert. den. 371 U. S. 952, 83 S. Ct. 508 (1963), reh. den. 375 U. S. 871, 84 S. Ct. 28 (1963); and *United States v. Interstate Commerce Commission*, 396 U. S. 491, 526 (1970) dealt with transactions falling within § 5(12) of the Interstate Commerce Act. The same is true of *Palmer v. Massachusetts*, 308 U. S. 79, 84 (1939) (State petition, p. 19) and *Laurence v. St. Louis-San Francisco Ry Co.*, 274 U. S. 588, 595 (1926) (State petition, p. 20).

State petition, pp. 14-17, urges that the ICC could not decide whether IC could deliver good title to the charter property. That might be true except that good title never has been an issue in this case. The only issues raised by the pleadings herein are (1) whether IC's tax immunities passed to Gulf under the merger, (2) whether Gulf may pay and certain state officials may collect the 7% tax in lieu of all other state and local taxes on the charter property, or (3) whether the charter property must now be assessed and regular railroad taxes paid on it.

Whether Gulf has good title, merely colorable title, or bad title is raised by no pleading in this case nor by the state court

decision. No one questions that IC executed and delivered to Gulf a sale indenture under which IC sold and conveyed to Gulf five years ago all of IC's assets including the charter property, and that IC went out of business. If the State seeks rescission, it should have counterclaimed or filed a separate action somewhere, which it did not do.

In fact, if Gulf did not own or have title to the charter property, since the State has collected roughly \$18,000,000 from Gulf since 1972, the State is in the unique position of having its chief legal officer confess error by indirectly admitting that the State has collected roughly \$18,000,000 from the wrong taxpayer. Presumably, the State also is willing to refund that sum to the taxpayer from whom the State infers it wrongfully collected it.

State petition, pp. 18-20, relying largely on this Court's decision in *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 83 (1879); *York & M. L. R. Co. v. Winans*, 58 U. S. 30, 39 (1854); *Branch v. Jesup*, 106 U. S. 458, 463 (1883); *Pennsylvania R. Co. v. St. Louis A. & T. H. R. Co.*, 118 U. S. 290, 313 (1886); and *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 41 (1891), all of which dealt with fact situations which arose before passage of 49 USC § 5(11), urges that railroads "cannot unilaterally absolve themselves from the performance of their obligations under their charters without the consent of the State legislature".

As previously pointed out, the State's quarrel really is with Congress, not with the courts. Whether the State believes it or not, 49 USC § 5(12), under its first clause directly supersedes state law to permit carriers to own property in ICC approved transactions without State approval, and under its second clause suspends state law insofar as is necessary to implement a merger. It certainly was necessary to suspend state law in the instant case if the State is correct in its assertion that the State's consent was necessary for the charter property to be conveyed to Gulf.

Since the language of the charter does not require State consent for sales by IC of charter property and since IC sold charter property for 124 years without State consent, probably the State's position is wrong from the start that State consent was necessary to convey the charter property to Gulf. However, if the State is correct, then such State law has been so superseded. Insofar as *Thomas v. West Jersey R. Co.*, *York & M. L. R. Co. v. Winans*, *Branch v. Jesup*, *Pennsylvania R. Co. v. St. Louis A. & T. H. R. Co.*, and *Central Transportation Co. v. Pullman's Palace Car Co.* are based on federal law, they also have been superseded by 49 USC 5(12).

State petition, p. 19, as previously pointed out, asserts a Tenth Amendment argument which the State never asserted in either the trial court or the Illinois Supreme Court. It was the plaintiffs (not the State) who argued in response to Gulf's answer that the ICC had no power over either state tax immunities or state taxation, that both of those powers are reserved to the states under the Tenth Amendment, and that in any event neither the plan nor the ICC purported to deal with either state tax immunities or state taxation.

In addition, the State misconstrues the facts. The ICC did not purport to decide whether IC's tax immunities passed to Gulf or whether Gulf could pay the 7% tax in lieu of all other state and local taxes. All that the ICC did, insofar as it is pertinent to this case, was to approve the plan under which the charter property was to be conveyed to Gulf and IC was to be dissolved. It was then left to the merging carriers to do those things, which they did.

IC conveyed the charter property to Gulf, IC ceased doing business and has conducted no business for five years, and IC attempted to dissolve by filing articles of dissolution with the Illinois Secretary of State, but the Secretary of State concluded he had no statutory authority to accept them since his statutory authority only extended to general business and not-for-profit

corporations organized under statutes passed many years after 1851.

It was the trial court and the Illinois Supreme Court (not the ICC), based upon the plaintiffs' complaint, which decided that IC's tax immunities did not pass to Gulf, that Gulf could not pay the 7% tax in lieu of all other state and local taxes on the charter property, and that the charter property had to be assessed and regular railroad taxes paid upon it, which decisions neither IC nor Gulf appeal to this Court. There has been no federal impingement on the state courts to decide these state questions. It was the state courts which decided such questions adversely to the State, which state court decisions the State now seeks to reverse.

The trial court and the Illinois Supreme Court rightly concluded that there would have been no merger unless the charter property could be conveyed to Gulf without the consent of the State because the charter property was critical to the merger; that if the State had bothered to appear before the ICC to argue that the charter property could not be conveyed without the State's consent, the ICC, of necessity and in order to implement the national transportation, would have found that such state law had to be superseded in order to implement the merger; and that since the State, after notice, did not trouble itself to appear before the ICC and since the plan specifically provided that IC was to convey the charter property to Gulf, the state courts could only conclude that after the ICC's approval of the plan, 49 USC § 5(12) superseded state law to permit Gulf to own the charter property without State approval and that the same statute also superseded state law insofar as was necessary to permit the charter property to be conveyed to Gulf.

State petition, pp. 20-21, argues that the 7% tax is imposed upon IC and that IC cannot avoid it by dissolution. That is fine except IC has no income, assets, officers or directors. It therefore cannot pay the 7% tax. IC's dissolution has nothing to do with its inability to pay the 7% tax. IC's lack of assets

and income renders it unable to pay the 7% tax. The State further argues that state statutes passed 34 and 50 years respectively after the charter was granted prohibit IC from dissolving or transferring assets. IC never consented to those subsequent statutes and since, as the State urges, the charter was a binding and solemn contract which could not be unilaterally amended or abrogated by either party and since IC derived all of its rights and powers from the charter alone, those subsequent statutes do not affect IC or this case, a conclusion which the state court decision also reaches (State petition, p. A11).

CONCLUSION.

The plan, which was approved by the ICC, approved the merger and provided, among other things, that IC was to convey the charter property to Gulf. Conveyance of the charter property to Gulf was necessary to the merger. There could have been no merger without it. The merger was implemented five years ago and at that time IC, in fact, conveyed the charter property (and all of its other assets) to Gulf.

The plan did not provide for and the ICC did not pass upon or consider state taxation or state tax immunities. Although it received proper notice, the State never appeared before the ICC to argue that state law prohibited conveyance of the charter property to Gulf. In fact, state law does not prohibit conveyance by IC to Gulf of the charter property since the charter expressly contemplates charter property sales to third parties and such sales were made by IC with the knowledge of and without the consent of the State for 124 years.

A necessary consequence of the State's failure to appear and make its arguments before the ICC is that, as the Illinois Supreme Court held, the national transportation policy must be implemented and since the ICC decision approved the merger, 49 USC § 5(12) superseded state law to permit conveyance of the charter property to Gulf. The State implies an administrative

remedy which it chose to ignore. The State cannot lie back and then collaterally attack the ICC decision. The ICC approval of the plan, therefore, is final; IC conveyed whatever title it had to the charter property (and all its other assets) to Gulf; and the merger was implemented, is final, and cannot be undone.

Although the State argued (State petition, pp. A11-12) that IC's unilateral actions in transferring (with ICC approval but without State approval) all of its assets to Gulf constituted a forfeiture and reversion to the State of the charter property, the State only abstractly so argued, because it never filed a pleading praying for that or any other relief, although the trial court gave the State an express 30-day continuance to file such a pleading, which the State refused to do. There is, therefore, no actual controversy on the issues sought to be raised in the State petition.

Not the ICC but rather the state courts decided that IC's tax immunities were not and could not be conveyed to Gulf under the plan without the consent of the Illinois General Assembly (which had not been given), that Gulf could not pay and State officials could not collect the 7% tax in lieu of all other state and local taxes on the charter property, that the proper state officials were required to assess the charter property, and that Gulf was required to pay on the charter property the same railroad taxes which it paid on its non-charter property and which all other railroads pay on their Illinois property. The state court decision is absolutely correct on all issues.

In addition, there is no novel or important issue worthy of this Court's consideration. This Court many times in the Charter Immunity Cases, beginning 100 years ago, decided the questions upon which the state court decision rests. The state court decision merely reflects what has been for over 70 years the settled law regarding the transfer of tax immunities to successor

railroad corporations where the legislature has not given its approval. The State petition, therefore, should be denied.

Respectfully submitted,

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